

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

In re Blue Spike, LLC,
Patent Litigation

§
§
§
§
§
§
§
§
§
§
§

MDL- 2794

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF BLUE SPIKE'S
MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407**

TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| I. INTRODUCTION | 1 |
| II. BACKGROUND | 1 |
| III. ARGUMENT | 3 |
| A. Centralization Is Unwarranted Because Blue Spike Has Failed To Show Any Relevant Common Issues Of Fact..... | 3 |
| 1. Common Asserted Patents Do Not Warrant Centralization | 4 |
| 2. Different Asserted Claims Weigh Against Centralization..... | 6 |
| 3. Different Accused Products Weighs Against Centralization..... | 7 |
| 4. Disparate Questions Of Fact Weigh Against Centralization | 8 |
| 5. Different Procedural Postures Weigh Against Centralization | 8 |
| B. Transfer Would Neither Advance A Just And Efficient Resolution Of The Actions Nor Serve The Convenience Of The Parties | 9 |
| 1. Blue Spike Should Not Be Allowed To Skirt Judicial Precedent Banning Forum Shopping In Patent Cases | 9 |
| 2. The Disparity Between Defendants, Claims, And Procedural Stages Makes These Actions Inappropriate For Centralization..... | 11 |
| 3. Blue Spike’s History Of Resolving Actions Quickly And Efficiently Weighs Against Centralization | 14 |
| 4. All Defendants Agree That Centralization Would Be Improper And Unnecessary | 15 |
| 5. The Number Of Pending Cases Does Not Warrant Centralization..... | 16 |
| C. If The Actions Are Centralized, They Should Be Centralized In N.D. Cal..... | 17 |
| 1. N.D. Cal. Is More Convenient For the Parties And Witnesses..... | 18 |
| 2. N.D. Cal. Can Ensure The Just And Efficient Conduct Of These Proceedings..... | 19 |
| 3. Any Efficiency Associated With Centralization In E.D. Tex. Is Minimal..... | 20 |
| IV. CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|--------------------|
| <i>In re ArrivalStar S.A. Fleet Mgmt. Sys. Patent Litig.</i> , 802 F. Supp. 2d 1378 (J.P.M.L. 2011)..... | 11, 14, 15 |
| <i>In re Cable Tie Patent Litig.</i> , 487 F. Supp. 1351 (J.P.M.L. 1980)..... | 14 |
| <i>In re Charles R. Bobo Patent Litig.</i> , 829 F. Supp. 2d 1374 (J.P.M.L. 2011)..... | 3 |
| <i>Children’s Network, LLC v. PixFusion LLC</i> , 722 F. Supp. 2d 404 (S.D.N.Y. 2010)..... | 4 |
| <i>In re Compression Labs, Inc., Patent Litig.</i> , 360 F. Supp. 2d 1367 (J.P.M.L. 2005)..... | 19, 20 |
| <i>In re Constellation Techs. LLC Patent Litig.</i> , 38 F. Supp. 3d 1392 (J.P.M.L. 2014)..... | 5, 17 |
| <i>In re Desloratadine Patent Litig.</i> , 502 F. Supp. 2d 1354 (J.P.M.L. 2007)..... | 13, 18 |
| <i>In re Eli Lilly & Co. Oraflex Prods. Liab. Litig.</i> , 578 F. Supp. 422 (J.P.M.L. 1984)..... | 3 |
| <i>Fed. Trade Comm’n v. Golden Empire Mortg., Inc.</i> , No. CV 09-3227, 2009 WL 10674463 (C.D. Cal. Sept. 21, 2009)..... | 19 |
| <i>Finisar Corp. v. DirectTV Grp., Inc.</i> , 523 F.3d 1323 (Fed. Cir. 2008)..... | 14 |
| <i>In re Genentech, Inc.</i> , 566 F.3d 1338 (Fed. Cir. 2009)..... | 10 |
| <i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011)..... | 8 |
| <i>In re Google Inc.</i> , No. 2015-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015)..... | 10, 18 |
| <i>In re Highway Accident Near Rockville Cnty.</i> , 388 F. Supp. 574 (J.P.M.L. 1975)..... | 11 |
| <i>In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.</i> , 763 F. Supp. 2d 1377 (J.P.M.L. 2011)..... | 16 |
| <i>In re: Droplets, Inc., Patent Litig.</i> , 908 F. Supp. 2d 1377 (J.P.M.L. 2012)..... | 6, 16, 17 |

| | |
|--|--------|
| <i>In re: Gerber Probiotic Prod. Mktg. & Sales Practices Litig.</i> , 899 F. Supp. 2d 1378 (J.P.M.L. 2012)..... | 16 |
| <i>In re: Oplus Techs., Ltd., Patent Litig.</i> , 899 F. Supp. 2d 1373 (J.P.M.L. 2012)..... | 15 |
| <i>In re: Protegrity Corp. & Protegrity USA, Inc., Patent Litig.</i> , 84 F. Supp. 3d 1380 (J.P.M.L. 2015)..... | 17 |
| <i>In re: Spray Polyurethane Foam Insulation Prod. Liab. Litig.</i> , 949 F. Supp. 2d 1364 (J.P.M.L. 2013)..... | 12 |
| <i>In re Innovatio IP Ventures, LLC, Patent Litigation, MDL</i> , No. 2303, 2011 WL 6890252 (J.P.M.L. 2011)..... | 13, 15 |
| <i>In re Molinaro/Catanzaro Patent Litig.</i> , 464 F. Supp. 966 (J.P.M.L. 1979)..... | 14 |
| <i>In re Motion Picture Licensing Antitrust Litig.</i> , 479 F. Supp. 581 (J.P.M.L. 1979)..... | 11 |
| <i>In re Move Artwork Copyright Litig.</i> , 473 F. Supp. 2d 1381 (J.P.M.L. 2007)..... | 8 |
| <i>Nat'l Presto Indus., Inc. v. W. Bend Co.</i> , 76 F.3d 1185 (Fed. Cir. 1996)..... | 8 |
| <i>P'ship v. Microsoft Corp.</i> , 598 F.3d 831 (Fed. Cir. 2010)..... | 8 |
| <i>In re Pilepro Antitrust & Patent Litig.</i> , 140 F. Supp. 3d 1350 (J.P.M.L. 2015)..... | 5 |
| <i>Raytheon Co. v. Cray, Inc.</i> , No. 2:15-cv-01554-JRG, Dkt. 289 (E.D. Tex. June 29, 2017) | 10 |
| <i>Saval v. BL Ltd.</i> , 710 F.2d 1027 (4th Cir. 1983) | 12 |
| <i>TC Heartland LLC v. Kraft Foods Grp. Brands LLC</i> , 581 U.S. ___, 2017 WL 2216934 (May 22, 2017) | 9, 10 |
| <i>U.S. Ethernet Innovations, LLC v. Acer, Inc.</i> , No. 6:09-cv-448-JDL, 2010 WL 2771842 (E.D. Tex. July 13, 2013)..... | 19 |
| <i>In re Wachovia Sec., LLC, Wage & Hour Litig.</i> , 469 F. Supp. 2d 1346 (J.P.M.L. 2006)..... | 20 |
| <i>WIAV Networks, LLC v. 3Com Corp.</i> , No. C 10-03448, 2010 WL 3895047 (N.D. Cal. Oct. 1, 2010)..... | 4 |
| <i>Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.</i> , 442 F.3d 1322 (Fed. Cir. 2006)..... | 13 |

Statutes

28 U.S.C. § 1400(b) 9
28 U.S.C. § 1404..... 9
28 U.S.C. § 1406..... 9
28 U.S.C. § 1407..... passim

Other Authorities

Federal Judicial Caseload Statistics 2016 Tables, United States Courts, Table C-1, C-5,
<http://www.uscourts.gov/federal-judicial-caseload-statistics-2016-tables>. (July
27, 2017) 20

FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.14 (2004) 14, 16

Schedule of Actions, Citations, & Abbreviations

| Civil Actions & Citations | Abbreviations |
|--|----------------------|
| <i>Blue Spike, LLC v. Contixo Inc.</i> , 6:16-cv-01220-RWS-JDL (E.D. Tex.) | <i>Contixo</i> |
| <i>Blue Spike, LLC v. Juniper Networks, Inc.</i> , 6:17-cv-00016-RWS-KNM (E.D. Tex.) | <i>Juniper</i> |
| <i>Blue Spike, LLC v. LeMall Corp. & LeEco Group</i> , 6:17-cv-00063-RWS-KNM (E.D. Tex.) | <i>LeMall</i> |
| <i>Blue Spike, LLC v. MarkAny, Inc.</i> , 6:17-cv-0138-RWS (E.D. Tex.) | <i>MarkAny</i> |
| <i>Blue Spike, LLC v. Caterpillar, Inc., Nook Digital, LLC</i> , 6:16-cv-01361-RWS-JDL (E.D. Tex.) | <i>Nook I</i> |
| <i>Blue Spike, LLC v. Barnes & Noble, Inc.</i> , 6:17-cv-00175-JRG (E.D. Tex.) | <i>Nook II</i> |
| <i>Blue Spike, LLC v. NVIDIA Corp.</i> , 6:17-cv-00096-RWS-KNM (E.D. Tex.) | <i>NVIDIA</i> |
| <i>Blue Spike, LLC v. Razer USA Ltd.</i> , 6:17-cv-00099-RWS (E.D. Tex.) | <i>Razer</i> |
| <i>Blue Spike, LLC v. Roku, Inc.</i> , 1:17-cv-928 (D. Del.) | <i>Roku</i> |
| <i>Blue Spike, LLC v. SkyStream Tech., LLC</i> , 6:17-cv-00101-RWS (E.D. Tex.) | <i>SkyStream</i> |
| <i>Blue Spike, LLC v. Toshiba America, Inc.</i> , 6:16-cv-430-JDL (E.D. Tex.) | <i>Toshiba I</i> |
| <i>Blue Spike, LLC v. Toshiba Am., Inc. & Toshiba Corp.</i> , 6:17-cv-00053-RWS-KNM (E.D. Tex.) | <i>Toshiba II</i> |
| <i>Blue Spike, LLC v. Verimatrix</i> , 2:16-cv-329-RWS (E.D. Tex.) | <i>Verimatrix</i> |
| <i>Blue Spike, LLC v. VIZIO, Inc.</i> , 8:17-cv-01172 (C.D. Cal.) | <i>VIZIO</i> |
| <i>TC Heartland LLC v. Kraft Foods Grp. Brands LLC</i> , 581 U.S. ___, 2017 WL 2216934 (May 22, 2017) | <i>TC Heartland</i> |
| Judicial Panel on Multidistrict Litigation | Panel |
| Plaintiff Blue Spike, LLC | Blue Spike |
| Eastern District of Texas | E.D. Tex. |
| Central District of California | C.D. Cal. |
| Northern District of California | N.D. Cal. |
| Blue Spike, LLC's Memorandum In Support Of Plaintiff's Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 | Motion or Mot. |
| Exhibits to the Declaration of Andrew M. Holmes In Support Of Defendants' Response In Opposition To Plaintiff's Motion For Transfer Of Actions | Ex. |

*Blue Spike filed a "Schedule of Actions," which can be found at Docket No. 2-2.

I. INTRODUCTION

Centralization is not warranted even under an interpretation of the facts most favorable to Blue Spike. In seeking centralization, Blue Spike's Motion attempts to skirt judicial precedent that expressly prohibits forum shopping and grouping together unrelated patent cases, like those at issue here. Blue Spike's Motion is also an attempt to side-step patent venue rules and undo prior court orders to dismiss or transfer actions based on findings of improper venue. Indeed, none of the hallmarks of Multidistrict Litigation are present: the asserted patents are different; the asserted claims are diverse; the procedural histories are mixed; and the accused products and thus infringement theories vary widely across cases. Moreover, Blue Spike's prior dismissals and settlement history demonstrate that most of Blue Spike's actions involving the asserted patents have not required substantial judicial attention, and thus centralization is not needed. Blue Spike has asserted one or more of the asserted patents in approximately 33 different cases since the beginning of 2016. Out of those 33 cases, the vast majority have settled or were voluntarily dismissed in less than a year and before a claim construction hearing. None of those prior cases warranted centralization, and neither do the cases before this Panel. Accordingly, all of the defendants who are signatories to this brief¹ request that the Panel deny Blue Spike's Motion under 28 U.S.C. § 1407.

II. BACKGROUND

Blue Spike seeks to centralize 14 patent infringement actions² against 14 different

¹ Visual Land's motion to dismiss was granted during the writing of this Opposition. Accordingly, Visual Land does not sign onto this brief.

² *Verimatrix*, 2:16-cv-329-RWS (E.D. Tex.); *Toshiba I*, 6:16-cv-430-JDL (E.D. Tex.) (dismissed July 21, 2017); *Contixo Inc.*, 6:16-cv-01220-RWS-JDL (E.D. Tex.) (dismissed July 26, 2017); *Nook I*, 6:16-cv-01361-RWS-JDL (E.D. Tex.); *Juniper*, 6:17-cv-00016-RWS-KNM

defendants.³ In total, 34 patents have been asserted across the 14 actions. *See* Ex. A. In each action, the number of patents asserted ranges from five to 24, and no single patent is common to all actions. *Id.* For the actions with common patents, the asserted claims are not the same. *Id.*

These 14 actions are currently pending in three different districts: the Eastern District of Texas, the Central District of California, and the District of Delaware. Procedurally, they are in various stages, and some of them have been consolidated in their respective courts.⁴

- MarkAny and VIZIO have not yet been served with a complaint.
- Juniper and NVIDIA filed answers and are planning to file motions to dismiss and/or transfer. *NVIDIA*, 6:17-cv-00096-RWS-KNM, Dkt. 16; *Juniper*, 6:17-cv-00016-RWS-KNM, Dkt. 24.
- LeMall, Media Science Inc. (“MSI”), Nook,⁵ Razer, SkyStream, Toshiba, and Visual Land have filed motions to dismiss in their cases. *LeMall*, 6:17-cv-00063-RWS-KNM, Dkt. 12; *Verimatrix*, 2:16-cv-329-RWS, Dkt. 76; *Nook I*, 6:16-cv-01361-RWS-JDL, Dkt. 86; *Razer*, 6:17-cv-00099-RWS, Dkts. 13, 16; *SkyStream*, 6:17-cv-00101-RWS, Dkt. 12; *Toshiba I*, 6:16-cv-430, Dkt. 52; *Contixo*, 6:16-cv-01220-RWS-JDL, Dkt. 34. MSI’s motion to dismiss or transfer was granted and that case was transferred to C.D. Cal. on July 6, 2017. *Verimatrix*, 2:16-cv-329-RWS, Dkt. 76. Toshiba’s and Visual Land’s motions to dismiss were granted on July 21, 2017 and July 26, 2017, respectively. *Toshiba I*, 6:16-cv-430, Dkt. 55; *Contixo*, 6:16-cv-01220-RWS-JDL, Dkt. 48.
- Initial disclosures and claim construction proceedings began in the action against MSI before it was transferred, *Verimatrix*, 2:16-cv-329-RWS, Dkt. 159, 161-62, and a claim construction hearing was held in a case against Toshiba on April 21, 2017. *Toshiba I*, 6:16-cv-430-JDL, Dkt. 38.

(E.D. Tex.); *Toshiba II*, 6:17-cv-00053-RWS-KNM (E.D. Tex.); *LeMall*, 6:17-cv-00063-RWS-KNM (E.D. Tex.); *NVIDIA*, 6:17-cv-00096-RWS-KNM (E.D. Tex.); *Razer*, 6:17-cv-00099-RWS (E.D. Tex.); *SkyStream*, 6:17-cv-00101-RWS (E.D. Tex.); *MarkAny*, 6:17-cv-0138-RWS (E.D. Tex.); *Nook II*, 6:17-cv-00175-JRG (E.D. Tex.); *Roku*, 1:17-cv-928 (D. Del.); *VIZIO*, 8:17-cv-01172 (C.D. Cal.).

³ The 14 actions originally involved 43 defendants. However, as of the filing of this Response, 29 defendants have since settled or been dismissed.

⁴ NVIDIA, Razer, and SkyStream had their actions consolidated for pretrial purposes in E.D. Tex. on July 10, 2017. *NVIDIA*, 6:17-cv-00096-RWS-KNM, Dkt. 22.

⁵ The magistrate judge presiding over Nook’s case recommended granting Nook’s motion to dismiss for improper venue on July 28, 2017. *Nook I*, 6:16-cv-01361-RWS-JDL, Dkt. 97.

III. ARGUMENT

Under 28 U.S.C. § 1407, the moving party bears the burden of establishing that (1) the actions sought to be centralized and transferred share significant common issues of fact, and (2) transfer would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of the actions. 28 U.S.C. § 1407; *In re Select Retrieval, LLC*, (‘617) Patent Litig., 883 F. Supp. 2d 1353, 1354 (J.P.M.L. 2012). The moving party must not only show that common factual issues exist but that transfer to a single district is justified. 28 U.S.C. § 1407.

“Centralization of any litigation—including patent cases—is not automatic, and will necessarily depend on the facts, parties, procedural history and other circumstances in a given litigation.” *Select Retrieval*, 883 F. Supp. 2d at 1354 (citation omitted); *see also In re Charles R. Bobo Patent Litig.*, 829 F. Supp. 2d 1374, 1375 (J.P.M.L. 2011) (denying centralization because there was not “enough commonality to make centralization necessary or even advantageous”). Additionally, even if all the actions allege that defendants infringe the same patent, centralization is not warranted if “the litigation has not progressed to a point that the parties have determined the specific nature of that alleged infringement or to what extent infringement allegations will be common to the defendants across these actions.” *Select Retrieval*, 883 F. Supp. 2d at 1354.

A. Centralization Is Unwarranted Because Blue Spike Has Failed To Show Any Relevant Common Issues Of Fact

Common questions of fact *must* “*predominate*” over individual factual questions in order to transfer and centralize cases. *In re Eli Lilly & Co. Oraflex Prods. Liab. Litig.*, 578 F. Supp. 422, 423 (J.P.M.L. 1984) (denying centralization). For numerous reasons, Blue Spike’s Motion falls far short of showing that common factual questions permeate the 14 different cases and predominate the factual issues that will need to be litigated.

1. Common Asserted Patents Do Not Warrant Centralization

A plaintiff may not join multiple, unrelated defendants in one action based solely on an allegation that the defendants infringe the same patent or patents. *See, e.g., WIAV Networks, LLC v. 3Com Corp.*, No. C 10-03448, 2010 WL 3895047, at *1 (N.D. Cal. Oct. 1, 2010) (finding joinder improper where plaintiff was “suing unrelated and competing defendants for their own independent acts of infringement”); *Children’s Network, LLC v. PixFusion LLC*, 722 F. Supp. 2d 404, 415 (S.D.N.Y. 2010) (finding centralization of “unrelated parties into one action is generally inappropriate where, as here, the infringement of the same patent is alleged, but the products are different”). But here, that is the only common factual issue Blue Spike identifies to support centralization. Mot. at 7-8. Blue Spike asserts that “[t]he majority of the actions address infringement claims regarding the same seven (7) patents” *Id.* at 7.⁶ That statement is incorrect. But even if that statement were true, Blue Spike offers nothing else. *Id.* at 7-8. It does not argue that the accused products are the same. It does not argue that the asserted claims are the same. It does not argue that the facts relating to damages, indirect infringement, or any other issue are the same. Nor could it make those arguments, because they would be untrue.

Moreover, Blue Spike’s lone “factual” argument that there are seven common patents across all cases is incorrect. No Blue Spike patent is asserted against all of the 14 different defendants. Put another way, there is no single patent that is common to all 14 actions. *See* Ex. A. For example, one Blue Spike case only has five asserted patents while another case has many as 24 patents. *Id.* In total, there are 34 different patents asserted in different groupings against

⁶ Blue Spike’s statement that “Movant is the plaintiff in a series of fourteen (14) related actions for patent infringement against twenty (20) defendants . . . concerning the same thirty-four (34) U.S. Patents” is false. As explained in more detailed throughout this Brief, the 14 Blue Spike cases do not “concern[] the same thirty-four (34) patents.” Blue Spike has asserted different subsets of its patents against different defendants.

14 different defendants. Ex. A. And the 34 asserted patents do not even share a common patent family. The patents comprise at least nine different patent families, with different patents from different families being asserted against different products of different defendants, with no meaningful overlap. *Id.*

The situation here is similar to *In re Constellation Techs. LLC Patent Litig.*, 38 F. Supp. 3d 1392 (J.P.M.L. 2014) where centralization was denied. In *Constellation*, 29 patents were asserted in five separate actions and only one patent was common across all actions. *Id.* at 1392. And although the 29 *Constellation* patents related to the telecommunications industry generally, the patents “involve[d] a wide range of technologies and d[id] not descend from a common patent ‘family.’” *Id.* at 1393. Based on these facts, the Panel denied centralization, reasoning that “the potential for centralization to reduce duplicative discovery and motion practice in this litigation is somewhat limited, whereas the potential for a centralized litigation to become mired in the unique factual and legal issues raised in each action—in particular, relating to the twenty patents at issue solely in the Delaware actions—is significant.” *Id.* Similarly, the Blue Spike cases would not benefit from centralization. There are 34 patents being asserted across 14 cases, and not a single patent is asserted against all of the defendants. If these actions were centralized, the centralized litigation would be overwhelmed with unique factual and legal issues specific to each individual case. *In re Pilepro Antitrust & Patent Litig.*, 140 F. Supp. 3d 1350, 1351 (J.P.M.L. 2015) (“[T]here is not sufficient factual overlap among these actions to warrant centralization. While both actions involve issues of infringement and validity of patents held by [plaintiff], they are not the same patents.”). Given the disparity in the asserted patents, centralization is not warranted.

2. Different Asserted Claims Weigh Against Centralization

Even for the Blue Spike cases that share some asserted patents, Blue Spike has asserted different patent claims against the defendants, further compounding the factual disparity between the actions. For example, in the *LeMall* and *Nook I and II* cases, although Blue Spike has asserted the '246, '561, '569, and '719 patents against both defendants, it accuses each defendant of infringing different claim sets, as shown below:

- '246: LeMall (Claim 17), Nook Digital (Claim 1) (*Nook II*)
- '561: LeMall (Claim 9), Nook Digital (Claim 1) (*Nook II*)
- '569: LeMall (Claim 16), Nook Digital (Claim 16-20) (*Nook I*)
- '719: LeMall (Claim 1), Nook Digital (Claims 1, 10-12, 21-22) (*Nook I*)

The LeMall-Nook Digital comparison is just one example of the various different claim sets asserted across the various defendants, which will require distinct litigation and adjudication on infringement (different products from different companies), claim construction (different claim terms depending on the asserted claim sets), and validity (different prior art depending on the asserted claim sets). A full list of the different asserted claims against each defendant is provided in Exhibit B, which shows that centralization is not justified here. *See In re: Droplets, Inc., Patent Litig.*, 908 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012).

Further, although a handful of claims may overlap, that minimal commonality does not justify centralization. The fact that a small number of claims might be asserted against some but not all defendants will not meaningfully alleviate discovery burdens for the parties. Nor will it guarantee the streamlining of infringement, validity, or claim construction (among other issues), because, on balance, the vast majority of the asserted claims are different, the parties are different, and the accused products and technology are different across all cases. *See Droplets,*

908 F. Supp. 2d at 1378 (noting that “the claim terms in dispute are not identical from action to action,” which weighed against centralization). Rather, under these facts, centralization is more likely to hinder the discovery process with piecemeal, isolated disputes that are not relevant to most of the defendants.

3. Different Accused Products Weighs Against Centralization

Centralization also is not warranted because the accused products from the 14 defendants are different. In some cases, the accused products compete against one another, and in other cases the accused products are in completely different technical industries. For instance, the accused products include televisions (VIZIO, LeMall, Toshiba), tablet computers (NVIDIA, Nook Digital, Visual Land), personal computers (Toshiba), routers (Juniper), watermarking software (MarkAny, Media Science), virtual currency (Razer), smartphones (LeMall), telephone servers (Toshiba), streaming media players (SkyStream, Roku), and digital rewards programs (Razer). The common factual issues, if any, that may arise between such disparate products/technologies as watermarking software, tablet computers, telephone servers, or virtual currencies will likely be negligible or nonexistent.

Tellingly, Blue Spike’s Motion ignores these obvious differences across the accused products. Blue Spike’s Motion makes no argument—let alone an evidentiary showing—that there is any commonality across the proceedings with respect to the accused products. And it cannot. Any infringement analysis of the accused products will necessarily require individualized (i) proof relating to each defendant’s unique accused products and offerings, (ii) fact discovery, (iii) non-infringement expert discovery, (iv) non-infringing alternatives expert discovery, and (v) damages expert discovery, among other case-specific discovery relating to Blue Spike’s injunctive relief demands. *See In re: Genetic Techs. Ltd. (’179) Patent Litig.*, 883

F. Supp. 2d 1337, 1338 (J.P.M.L. 2012). Blue Spike has not addressed any of these obvious factual differences that will complicate any centralized proceeding.

4. Disparate Questions Of Fact Weigh Against Centralization

In addition to the disparate questions of fact regarding infringement, validity, and damages, particularized questions of fact also exist with respect to Blue Spike's allegations of willfulness and indirect infringement, further illustrating that case-specific factual issues permeate Blue Spike's 14 cases, as opposed to "common" issues. The willful, induced, and contributory infringement allegations pled against nearly all the defendants depend on factors and evidence that are unique to each defendant. *See In re Move Artwork Copyright Litig.*, 473 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007). For instance, Blue Spike's claims of willful infringement, induced infringement, and contributory infringement each turn on facts unique to each defendant such as the defendant's knowledge of the asserted patents in its specific case and whether that defendant acted in an objectively reckless manner. *Nat'l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1192-93 (Fed. Cir. 1996) (willfulness); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764-66 (2011) (induced infringement); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010) (contributory infringement). Common factual issues thus do not permeate these cases. *Genetic Techs.*, 883 F. Supp. 2d at 1338.

5. Different Procedural Postures Weigh Against Centralization

The vast majority of the Blue Spike cases are on different schedules and at different procedural stages, which also weighs against centralization. *See Select Retrieval*, 883 F. Supp. 2d at 1354 (holding that centralization is not warranted if "the litigation has not progressed to a point that the parties have determined the specific nature of the alleged infringement or to what extent infringement allegations will be common to the defendants across these actions"). For example, some cases have progressed well past claim construction (*e.g., Toshiba, Verimatrix*)

while in others, Blue Spike has not even served a complaint (*e.g.*, *VIZIO*, *MarkAny*). Other cases are postured differently as well, *e.g.*, pre-case management conference (*e.g.*, *NVIDIA*, *Razer*, *LeMall*) or post-invalidity contentions but pre-claim construction (*e.g.*, *Nook I* and *II*). Not surprisingly, Blue Spike's Motion fails to explain why and how cases at such disparate procedural stages could benefit from being centralized.

B. Transfer Would Neither Advance A Just And Efficient Resolution Of The Actions Nor Serve The Convenience Of The Parties

Transfer and centralization of the actions would not serve the interests of justice nor judicial economy for a multitude of reasons.

1. Blue Spike Should Not Be Allowed To Skirt Judicial Precedent Banning Forum Shopping In Patent Cases

Blue Spike's Motion is a transparent attempt to use the MDL process to forum shop and circumvent federal laws governing venue for patent infringement cases. Specifically, Blue Spike seeks an end-around the Supreme Court's recent ruling in *TC Heartland* and well-established Federal Circuit case law relating to 28 U.S.C. Sections 1404 and 1406. Blue Spike seeks to side-step the venue statutes by forcing the defendants into an improper venue. The Supreme Court recently ruled in *TC Heartland* that corporate defendants in patent infringement suits can only be sued where they reside (*viz.*, state of incorporation) or have a regular and established place of business. *See TC Heartland v. Kraft Foods Grp. Brands LLC*, 518 U.S. ___, 2017 WL 2216934, at *8; 28 U.S.C. § 1400(b). But none of the defendants here reside in E.D. Tex.—they are Delaware, California, or Florida corporations. *See Ex. C*. Nor do they have offices in E.D. Tex.

that would be relevant to the issues in this case.⁷ In fact, several defendants have already moved to dismiss and/or transfer for improper venue in E.D. Tex. in light of *TC Heartland*, and two of those motions have been granted so far and the magistrate presiding over a third case has recommended granting dismissal.⁸ Other defendants (*e.g.*, Juniper, NVIDIA) intend to file similar motions to dismiss/transfer for improper venue.

Further, in numerous mandamus opinions over the past years, the Federal Circuit has repeatedly confirmed that forum shopping in patent cases is not acceptable. *See, e.g., In re Google Inc.*, No. 2015-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015); *In re Genentech, Inc.*, 566 F.3d 1338, 1341 (Fed. Cir. 2009). All of the defendants would be inconvenienced by transfer to—and in some instances *back* to (*e.g.*, MSI, Roku⁹)—E.D. Tex., a district where the

⁷ The issue of whether or not a defendant has a “regular and established place of business” under Section 1400(b) is an unsettled fact-specific inquiry. *Raytheon Co. v. Cray, Inc.*, No. 2:15-cv-01554-JRG, *Dkt.* 289 (E.D. Tex. June 29, 2017) (citing *Lace v. Lace*, No. 89 C 0414, 1989 WL 103364, at *2 (N.D. Ill. Aug. 28, 1989)). For the purposes of this Response, such an inquiry is not necessary, but based on the defendants’ websites, posted offices, and own representations, it is evident that the vast majority of defendants do not have offices in E.D. Tex. *See* Exs. H-K; *LeMall*, 6:17-cv-00063-RWS-KNM, *Dkt.* 18-9 at ¶¶ 11-15; *Verimatrix*, 2:16-cv-00329-RWS, *Dkt.* 76-1 at ¶ 2; *Nook I*, 6:16-cv-01361-RWS-JDL, *Dkt.* 86-3 at ¶ 3.

⁸ MSI moved for dismissal for improper venue and has been granted transfer to C.D. Cal. *Verimatrix*, No. 2:16-cv-00329, *Dkt.* 76. Roku also filed a motion to dismiss for improper venue that was granted. *Blue Spike LLC v. Roku, Inc.*, 6:17-cv-00100, *Dkt.* 17 (E.D. Tex.). The magistrate judge presiding over the *Nook I* case recommended granting Nook’s motion to dismiss for improper venue on July 28, 2017. *Nook I*, 6:16-cv-01361-RWS-JDL, *Dkt.* 97. Defendants LeMall, Razer, and Skystream have also moved to dismiss for improper venue in their respective actions and those motions are still pending. *LeMall*, 6:17-cv-00063-RWS-KNM, *Dkt.* 19; *Razer*, 6:17-cv-00099-RWS, *Dkt.* 16; *Skystream Tech.*, 6:17-cv-00101-RWS, *Dkt.* 12; *Barnes & Noble, Inc.*, 6:17-cv-00175-JRG, *Dkt.* 15. VIZIO also moved to dismiss the first complaint against it for improper venue, and Blue Spike voluntarily dismissed the case after the *TC Heartland* opinion issued. *VIZIO*, No. 6:17-cv-00060-RWS-KNM, *Dkts.* 6, 11, 12, 15.

⁹ Blue Spike first filed a patent infringement action against Roku on February 17, 2017 in E.D. Tex. *Roku*, 6:17-cv-00100, *Dkt.* 1. On May 26, 2017, Roku filed a motion to dismiss for improper venue, which the court granted. *Id.*, *Dkts.* 14, 17. Blue Spike re-filed its patent

defendants have no meaningful ties, witnesses, documents, or other relevant information related to the Blue Spike actions.

The fact that Blue Spike has so many actions currently pending is the result of its own litigation strategy, and allowing Blue Spike to centralize now is not in the interests of justice. Blue Spike chose to file 33 patent actions in the last year and now complains that the situation is unmanageable. But the Panel has made it clear that when a “plaintiff’s request for transfer is not motivated by a desire to achieve the purposes for which Section 1407 was designed, but rather, by a desire to circumvent obstacles . . . which necessitated [the] institution of [] separate actions,” this is an “additional and equally compelling reason for denying the requested transfer.” *In re Highway Accident Near Rockville Cnty.*, 388 F. Supp. 574, 576 (J.P.M.L. 1975).

In sum, the relief Blue Spike seeks would have grave long-term effects on patent litigation in the United States. It would give patent plaintiffs a free pass to side-step and ignore venue statutes and Supreme Court precedent. And it would encourage forum shopping through the MDL process.

2. The Disparity Between Defendants, Claims, And Procedural Stages Makes These Actions Inappropriate For Centralization

Contrary to Blue Spike’s unsupported assertions, combining 14 unrelated cases in a single action will not enhance judicial economy. It will instead result in an unmanageable case—precisely the scenario this Panel was created to avoid. *In re Motion Picture Licensing Antitrust Litig.*, 479 F. Supp. 581, 590-91 (J.P.M.L. 1979) (denying transfer). Because, as a whole, the defendants make and sell different accused products and specialize in different

infringement action against Roku on July 11, 2017 in the District of Delaware, asserting the same five patents previously asserted in E.D. Tex. *Roku*, 1:17-cv-928, Dkt. 1. Now, Blue Spike seeks to transfer Roku back to E.D. Tex.

industries, they are guaranteed to take different approaches throughout the case. *See In re: ArrivalStar S.A. Fleet Mgmt. Sys. Patent Litig.*, 802 F. Supp. 2d 1378, 1379 (J.P.M.L. 2011) (“[T]he diversity of defendants’ businesses may hinder the alleged infringers’ ability to adopt common positions regarding the interpretation of common claims of the various patents, which thereby diminishes some of the potential efficiencies created by centralization.”). This will burden the transferee court, as it struggles to weigh competing interests of a large number of parties on each of the issues raised by each of the different defendants. This, in turn, will unnecessarily complicate the issues and result in a waste of the court’s and the parties’ resources. *Saval v. BL Ltd.*, 710 F.2d 1027, 1032 (4th Cir. 1983) (holding that joinder of five different defendants “in a single action would not enhance judicial economy” where each claim arises from a different transaction or occurrence). In addition, some of the defendants are direct competitors. If the actions were centralized, the defendants that target the same market would require additional discovery protections, which would unnecessarily complicate the case from a case management standpoint. *See In re: Spray Polyurethane Foam Insulation Prod. Liab. Litig.*, 949 F. Supp. 2d 1364 (J.P.M.L. 2013).

Inefficiencies due to centralization would be further exacerbated because the cases are on different schedules and at different procedural stages, which is a problem that Blue Spike created by staggering its filings. For example, claim construction orders were issued in Blue Spike’s cases against Toshiba (in *Toshiba I*) and Verimatrix, whereas other defendants, like VIZIO, have not even been served yet. Centralization would therefore delay the more advanced cases and prejudice the rest, either by precluding defendants from asserting their own arguments and strategies or by requiring work already done by individual defendants in the separate actions to be re-done in the centralized action. At this point, centralization would only reverse the progress

that has already been made in many cases. Blue Spike should thus not be allowed to benefit from its own delay in bringing this Motion. *See Motion Picture Licensing*, 479 F. Supp. at 590.

Further, Blue Spike's claims are also certain to involve different legal questions relating to which terms and claims of the asserted patents are implicated, and whether a particular defendant's actions support a legally cognizable claim. *See Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1326-27 (Fed. Cir. 2006). Judicial economy will not result by having a single court adjudicate these divergent issues. As the Federal Circuit has recognized, a court's approach to claim construction may vary depending on the accused products at issue. *See Wilson*, 442 F.3d at 1326-27. And because each defendant's accused instrumentalities are different, the claim construction issues that arise for each defendant will also be different. *WIAV Networks, LLC*, No. C 10-3448, 2010 WL 3895047, at *2 ("the claim-construction work will not be the same for all defendants, even those facing trial on the same patent claim"). Each defendant therefore has a fundamental right to develop and present its own claim construction arguments. This right also extends to defendants' other substantive arguments. *See id.* ("[T]he accused defendants . . . are entitled to present individualized assaults on questions of non-infringement, invalidity, and claim construction."). Defendants' due process rights should not be compromised because of Blue Spike's mistaken efficiency arguments.

Blue Spike's concern about the possibility of inconsistent claim construction is unfounded as well. Mot. at 8-9.¹⁰ Courts have the discretion to coordinate case management

¹⁰ Blue Spike cites two decisions in support of its argument that the Panel has emphasized the need to obtain consistency in claim construction rulings. Mot. at 9 (citing *In re Desloratadine Patent Litig.*, 502 F. Supp. 2d 1354, 1355 (J.P.M.L. 2007) and *In re Innovatio IP Ventures, LLC, Patent Litigation*, MDL No. 2303, 2011 WL 6890252, at *1 (J.P.M.L. 2011)). But both cited

themselves in order to avoid unnecessary duplication of efforts. The alternative methods of coordination are far superior means to avoid unnecessary duplication and to achieve efficiency without centralization under Section 1407. *See In re Cable Tie Patent Litig.*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980) (denying transfer where “consultation and cooperation among the concerned district courts . . . coupled with the cooperation of the parties, would minimize the possibility of conflicting pretrial rulings.”); *In re Molinaro/Catanzaro Patent Litig.*, 464 F. Supp. 966, 969 (J.P.M.L. 1979) (same); *see also* FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.14 (2004). In fact, as discussed below, some cases already are being coordinated by their respective judges for pre-trial purposes. Furthermore, any inconsistencies in claim construction rulings can be resolved on appeal to the Federal Circuit, as is commonly done. *See Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1329 (Fed. Cir. 2008).

3. Blue Spike’s History Of Resolving Actions Quickly And Efficiently Weighs Against Centralization

Prior history of early dismissals and settlements by Blue Spike “suggests that the advantages centralization typically affords—*i.e.*, reducing duplicative discovery and motion practice, etc.—may not be relevant.” *In re ArrivalStar S.A. Fleet Mgmt. Sys. Patent Litig.*, 802 F. Supp. 2d 1378, 1379 (J.P.M.L. 2011); *see also In re High Quality Printing Inventions, LLC, ('070) Patent Litig.*, 176 F. Supp. 3d 1381, 1383 (J.P.M.L. 2016) (“The ***accelerating pattern of dismissals*** of such a large number of cases suggests that the remaining cases may not require the significant judicial attention that centralization would afford.”) (emphasis added).

cases are distinguishable. In *Innovatio*, no party challenged the centralization. 2011 WL 6890252, at *1. And in *Desloratadine*, the accused products were all generic copies of the same pharmaceutical. 502 F. Supp. 2d at 1355. Thus, that case did not involve different accused products, as here.

Here, Blue Spike's dismissal and settlement history demonstrates that most actions involving the patents-in-suit have required no substantial judicial attention and thus centralization is unnecessary. Blue Spike has asserted one or more of the asserted patents in approximately 33 different cases since the beginning of 2016. Out of those 33 cases, the vast majority were voluntarily dismissed or have settled in less than a year and before a claim construction hearing. *See* Ex. D; *see also, e.g., Contixo*, 6:16-cv-01220-RWS-JDL (E.D. Tex.). In fact, two cases were dismissed during the preparation of this Response.¹¹ Given Blue Spike's pattern of early dismissals and settlements, centralization is unnecessary and may "thwart the orderly resolution of these patent cases." *ArrivalStar*, 802 F. Supp. 2d at 1379; *In Re: Dietgoal Innovations, LLC ('561) Patent*, 999 F. Supp. 2d 1380, 1382 (J.P.M.L. 2014) (denying transfer where over half of all litigations settled and where three additional cases settled after the MDL motion was filed). A printout of the 33 Blue Spike cases indicating the date of filing and date of dismissal is attached as Exhibit D.

4. All Defendants Agree That Centralization Would Be Improper And Unnecessary

The efficiencies that can be gained by informal coordination by the parties further counsels against centralization. For example, all of the signatory defendants here oppose Blue Spike's Motion. That fact alone has been found to be a "persuasive factor" in denying centralization requests, and it should be persuasive here too. *In re "Lite Beer" Trademark Litig.*, 437 F. Supp. 754, 755-56 (J.P.M.L. 1977) ("the nearly unanimous opposition of the parties to transfer, coupled with the absence of any party's affirmative support for transfer, is another persuasive factor in [the Panel's] decision to deny transfer"). And defendants' efforts to work

¹¹ *Toshiba I*, 6:16-cv-430, Dkt. 55; *Contixo*, 6:16-cv-01220-RWS-JDL, Dkt. 48.

together—as evidenced by their joint filing of this Response—indicates their ability to informally coordinate for purposes of judicial economy, further demonstrating that centralization is unnecessary. *In re: Oplus Techs., Ltd., Patent Litig.*, 899 F. Supp. 2d 1373 (J.P.M.L. 2012) (denying motion to transfer).

Further, Blue Spike is the plaintiff in all 14 actions and is represented by the same counsel for all actions. Among the defense counsel, there also is some overlap. *See* Dkt. 15 (reflecting that, *e.g.*, NVIDIA and Nook Digital are represented by the same law firm). Accordingly, coordination outside of formal centralization is viable and likely. *See In re: Boehringer Ingelheim Pharm., Inc., Fair Labor Standards Act (FLSA) Litig.*, 763 F. Supp. 2d 1377, 1378 (J.P.M.L. 2011) (“Because plaintiffs in three actions share counsel and Boehringer is represented by common counsel, alternatives to formal centralization, such as voluntary cooperation among the few involved counsel and courts, appear viable.”); *see also Droplets*, 908 F. Supp. 2d at 1378.

5. The Number Of Pending Cases Does Not Warrant Centralization

Blue Spike’s main argument for centralization is that there are a large number of pending actions. But the sheer number of actions sought to be centralized is not dispositive of whether centralization should be granted. *See, e.g., In re: Plastic Injection Molding Mfg. Process (‘184) Patent Litig.*, 706 F. Supp. 2d 1376, 1377 (J.P.M.L. 2010) (declining to centralize 29 actions). Blue Spike ignores the fact that this Panel has repeatedly refused to centralize cases where there are less drastic measures available for managing discovery. *See In re: Gerber Probiotic Prod. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1379 (J.P.M.L. 2012) (“The Panel has often stated that centralization under Section 1407 should be the last solution after considered review of all other options.”) (internal quotation marks and citations omitted); *see also Plastic Injection*, 706 F. Supp. 2d at 1377 (citing *Eli Lilly*, 446 F. Supp. 242 and MANUAL FOR COMPLEX

LITIGATION (FOURTH), § 20.14). Moreover, the actions are currently pending in only three different districts, and the Panel has declined centralization when so few districts are implicated. *See Droplets*, 908 F. Supp. 2d at 1378 (denying centralization of actions “pending in just three districts”); *Oplus*, 899 F. Supp. 2d at 1373 (same); *In re: Genetic Techs. Ltd. (%2C179) Patent Litig.*, 883 F. Supp. 2d 1337, 1338 (J.P.M.L. 2012) (denying centralization of actions pending in four districts). Further, 12 actions are in E.D. Tex. and all of them have been assigned to Judge Robert W. Schroeder except for one. Among the 12 actions in E.D. Tex., three have already been coordinated for pre-trial purposes.¹² *See Droplets*, 908 F. Supp. 2d at 1378 (informal coordination was practicable where actions were being coordinated in their respective districts); *Constellation*, 38 F. Supp. 3d at 1393 (same).

As the Panel has previously held, coordination options available to Blue Spike include, but are not limited to: (1) serving particular deposition notices in all actions to make the deposition applicable in all actions; (2) stipulating among the parties to allow discovery produced in one action to be used in all; and (3) seeking orders from the different jurisdictions to encourage pre-trial coordination. *Eli Lilly*, 446 F. Supp. at 244. There is no reason why the parties cannot communicate and work together to develop a coordinated pre-trial plan that will promote the just and efficient conduct of all actions. *See Oplus*, 899 F. Supp. 2d at 1373 (denying transfer); *In re: Quest Integrity USA, LLC, ('874) Patent Litig.*, 148 F. Supp. 3d 1356, 1357 (J.P.M.L. 2015) (same).

C. If The Actions Are Centralized, They Should Be Centralized In N.D. Cal.

¹² NVIDIA, Razer, and SkyStream were consolidated on July 10, 2017 for pretrial purposes, other than venue related issues. *NVIDIA*, 6:17-cv-00096-RWS, Dkt. 22.

If the Panel were to decide to centralize these actions, transfer to N.D. Cal. would better serve the objectives of Section 1407.

1. N.D. Cal. Is More Convenient For the Parties And Witnesses

Defendants have agreed that N.D. Cal. would be an appropriate venue if the Panel decides to centralize these action. Of all available venues, N.D. Cal. is the locale where the largest number of defendants (five) are headquartered. *See Ex. C; In re: Protegrity Corp. & Protegrity USA, Inc., Patent Litig.*, 84 F. Supp. 3d 1380, 1382 (J.P.M.L. 2015) (transferring actions because “[s]everal accused infringers are located in or near” N.D. Cal.). Four additional defendants are headquartered in C.D. Cal. Ex. C. Accordingly, most of the relevant evidence and witnesses—including physical and electronic documents as well as engineers—relating to the accused products are likely located in N.D. Cal. or nearby in C.D. Cal. For the defendants and potential witnesses located in the C.D. Cal., traveling to N.D. Cal. is much more convenient than traveling to E.D. Tex. And, importantly, none of the defendants’ relevant documents or relevant witnesses are in E.D. Tex., which weighs against centralization there.

The location of known, relevant third parties shows that N.D. Cal. is the more convenient forum as well. Several of the actions implicate third party technology¹³ from Google, Netflix, and YouTube, all of whom are headquartered in N.D. Cal.¹⁴ In the likely event that the parties request documents and depose third party witnesses from Google, Netflix, and YouTube, N.D. Cal. would be a more convenient forum. Further, one of the named inventors—Michael

¹³ *NVIDIA*, No. 6:17-cv-00096-RWS (E.D. Tex.), Dkt. 1 ¶ 18; *Toshiba I*, 6:16-cv-00053-RWS-KNM (E.D. Tex.), Dkt. 1 ¶ 21.

¹⁴ Netflix is both headquartered in N.D. Cal. and leases 600,000 square feet there. Ex. E at 13. Google, owned by Alphabet Inc., created the accused Android OS and Google Play application and owns YouTube. Ex. F at 3. Alphabet is headquartered in Mountain View, CA. *Id.* at 18.

Berry¹⁵—lives in Seattle, which is far closer to N.D. Cal. than E.D. Tex. and thus a more convenient locale. *Blue Spike v. Google*, No. 4:14-cv-01650, *Dkt.* 16 at 7 (Mar. 13, 2014).¹⁶

In sum, documents or witnesses relevant to the accused technology are not located within E.D. Tex.¹⁷ but instead are mostly in California. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. 6:09-cv-448-JDL, 2010 WL 2771842, at *9 (E.D. Tex. July 13, 2013). In the event that centralization is found to be necessary, the actions should be centralized in California—and not in Texas, where none of the defendants are incorporated or have principal places of business. Ex. C; *see Fed. Trade Comm’n v. Golden Empire Mortg., Inc.*, No. CV 09-3227, 2009 WL 10674463, at *3 (C.D. Cal. Sept. 21, 2009).

2. N.D. Cal. Can Ensure The Just And Efficient Conduct Of These Proceedings

In the event the Panel orders centralization, N.D. Cal. would be the most appropriate forum. N.D. Cal. is experienced in managing complex patent cases as well as multidistrict litigations. *See Protegrity*, 84 F. Supp. 3d at 1382; *In re Compression Labs, Inc., Patent Litig.*, 360 F. Supp. 2d 1367, 1368–69 (J.P.M.L. 2005).¹⁸

¹⁵ *See, e.g.*, U.S. Patent Nos. 7,475,246, 8,171,561, 8,739,295.

¹⁶ Another co-inventor, Mr. Cooperman, resides in Maplewood, New Jersey. *See Cooperman v. Moskowitz*, No. 1:00-cv-00049, *Dkt.* 1 ¶ 2.

¹⁷ While Blue Spike asserts that its principal place of business is in Tyler, Texas, the public company records in Florida and the address listed in the patent assignments to Blue Spike, Inc. show otherwise. *See Ex. G; see also, e.g.*, USPN 8,171,561 and 8,739,295.

¹⁸ Further, Blue Spike’s prior settlement agreement with Toshiba requires it to file lawsuits against Toshiba (such as the one here) in N.D. Cal. In 2004, Blue Spike, LLC’s predecessors, Blue Spike, Inc. and Wistaria Trading, Inc. filed a lawsuit against Toshiba in the S.D. Fla. alleging infringement of three patents, including U.S. Patent No. 5,889,868 (“the ’868 patent”). In 2005, Blue Spike executed a settlement agreement with Toshiba (“2005 Agreement”) (*Toshiba II*, 6:17-cv-00053, *Dkt.* 17-2) in which the parties agreed to dismiss the 2004 lawsuit in return for, among other things, an agreement that any future lawsuit on the same patents or the same subject matter to be brought in N.D. Cal. *See* 2005 Agreement ¶¶ 2, 3, *Toshiba II*, 6:17-cv-

3. Any Efficiency Associated With Centralization In E.D. Tex. Is Minimal

E.D. Tex. handled 4,050 pending cases in the twelve months ending March 31, 2016.¹⁹ The median time to trial for civil cases was 22.8 months. *Id.* Over this same time period, N.D. Cal. handled 5,146 cases, with a median time to trial of 24.3 months. *Id.* Despite having more cases on its docket, N.D. Cal. was able process its cases in approximately the same amount of time as E.D. Tex., which shows that there are no meaningful efficiencies to be gained in E.D. Tex. over defendants' alternative venue.²⁰

IV. CONCLUSION

For the reasons set forth above, defendants respectfully request that the Panel deny Blue Spike's Motion for Transfer of Actions pursuant to 28 U.S.C. § 1407, or, in the alternative, transfer these cases to N.D. Cal.

Dated: August 2, 2017

Respectfully submitted,

By: /s/ Andrew M. Holmes

00053, Dkt. 17-2. On January 26, 2017, Blue Spike filed *Toshiba II*, alleging infringement of the same '868 patent, as well as 23 other patents, nine of which are continuations or divisionals of the '868 patent which involve the same subject matter as the '868 patent and are therefore subject to the forum selection clause of the 2005 Agreement. *Toshiba II*, 6:17-cv-00053, Dkt. 1; see Front Page of USPN 7,095,874, 7,409,073, 8,121,343, 8,175,330, 7,953,981, 7,987,371, 7,991,188, 7,913,087, and 7,647,502. A motion is pending in E.D. Tex. seeking transfer to the N.D. Cal. based on the 2005 Agreement. *Toshiba II*, 6:17-cv-00053, Dkt. 17.

¹⁹ *Federal Judicial Caseload Statistics 2016 Tables, United States Courts, Table C-1, C-5* (July 27, 2017), <http://www.uscourts.gov/federal-judicial-caseload-statistics-2016-tables>.

²⁰ Alternatively, defendants request C.D. Cal. as another venue option. Four defendants are headquartered there and have nearly all of their relevant witnesses and documents in that district. Further, there already is one Blue Spike case pending in that district with a judge experienced in managing MDL and patent proceedings. *VIZIO*, No. 8:17-cv-01172 (C.D. Cal.); see *In re Wachovia Sec., LLC, Wage & Hour Litig.*, 469 F. Supp. 2d 1346, 1347 (J.P.M.L. 2006). In addition, C.D. Cal. handled 9,928 cases (more cases than E.D. Tex.), with a civil case going to trial after a median time of 20.9 months (in a shorter time than E.D. Tex.). See *supra* n.19.

Sean S. Pak
CA State Bar No. 219032
seanpak@quinnemanuel.com
Andrew M. Holmes
CA State Bar No. 260475
drewholmes@quinnemanuel.com
Antonio Sistos
CA State Bar No. 238847
antoniosistos@quinnemanuel.com
Tina Lo
CA State Bar No. 311184
tinalo@quinnemanuel.com
QUINN EMANUEL URQUHART &
SULLIVAN LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Fax: (415) 875-6700

Mark Mann
Mann Tindel Thompson
300 West Main
Henderson, TX 75652
mark@themannfirm.com
Office 903-657-8540
Cell 903-658-0401
Marshall Office 903-472-4294
Tyler Office 903-596-0900

*ATTORNEYS FOR DEFENDANT NVIDIA
CORPORATION*

By: /s/ David Eiseman (with permission)
David Eiseman
davideiseman@quinnemanuel.com
Lindsay Cooper
lindsaycooper@quinnemanuel.com
Quinn Emanuel Urquhart & Sullivan, LLP
50 California Street, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

By: /s/ Jennifer H. Doan (with permission)
Jennifer H. Doan
Texas Bar No. 08809050

J. Randy Roeser
Texas Bar No. 24089377
Haltom & Doan
6500 Summerhill Road, Suite 100
Texarkana, TX 75503
Tel: 903.255.1000
Fax: 903.255.0800
Email: jdoan@haltomdoan.com
Email: rroeser@haltomdoan.com

*ATTORNEYS FOR DEFENDANT NOOK
DIGITAL, LLC*

By: /s/ Alan M. Fisch (with permission)
Alan M. Fisch
alan.fisch@fischllp.com
Jeffrey M. Saltman
jeffrey.saltman@fischllp.com
FISCH SIGLER LLP
5301 Wisconsin Avenue NW
Fourth Floor
Washington, DC 20015
Tel: (202) 362-3500

Melissa R. Smith
Texas State Bar No. 24001351
melissa@gillamsmithlaw.com
Gillam & Smith LLP
303 South Washington Avenue
Marshall, TX 75670
Tel: (903) 934-8450
Fax: (903) 934-9257

*ATTORNEYS FOR DEFENDANT JUNIPER
NETWORKS, INC.*

By: /s/Christopher Fahy (with permission)
Christopher J. Fahy, IL ARDC No. 6286130
Christian G. Stahl, IL ARDC No. 6290825
Louis A. Klapp, IL ARDC No. 6303722
QUARLES & BRADY LLP
300 North LaSalle Street, Suite 4000
Chicago, IL 60654-3422
Phone: (312) 715-5000

christopher.fahy@quarles.com
christian.stahl@quarles.com
louis.klapp@quarles.com

*ATTORNEYS FOR DEFENDANTS
LEMALL CORP. AND LE TECHNOLOGY
INC.*

By: /s/ Christopher Joe (with permission)

Christopher M. Joe
TX State Bar No. 00787770
Michael D. Ricketts
TX State Bar No. 24079208
BUETHER JOE & CARPENTER, LLC
1700 Pacific Avenue, Suite 4750
Dallas, TX 75201
Tel: (214) 466-1272
Fax: (214) 635-1828
chris.joe@bjciplaw.com
mickey.ricketts@bjciplaw.com

*ATTORNEYS FOR DEFENDANT
SKYSTREAM TECHNOLOGIES, LLC*

By: /s/ Rex Hwang (with permission)

Adrian M. Pruetz
Rex Hwang
Guy Rodgers
GLASER WEIL FINK HOWARD
AVCHEN & SHAPIRO LLP
10250 Constellation Blvd., 19th Floor
Los Angeles, CA 90067
Tel: (310) 553-3000
Fax: (310) 556-2920
apruetz@glaserweil.com
rhwang@glaserweil.com
grodgers@glaserweil.com

*ATTORNEYS FOR DEFENDANT VIZIO,
INC.*

By: /s/ Ryan Smith (with permission)

Ryan R. Smith

WILSON SONSINI GOODRICH &
ROSATI
650 Page Mill Road
Palo Alto, CA 94304
Tel: (650) 493-9300
Fax: (310) 493-6811
rsmith@wsgr.com

*ATTORNEYS FOR DEFENDANT RAZER
USA, LTD.*

By: /s/ Andrew Thomases (with permission)
Andrew Thomases
Carolyn L. Redding
ROPES & GRAY LLP
1900 University Ave., 6th Fl.
East Palo Alto, CA. 94303
Tel: (650) 617-4700
Fax: (650) 617-4090
andrew.thomases@ropesgray.com
carolyn.redding@ropesgray.com

*ATTORNEYS FOR DEFENDANT ROKU,
INC.*

By: /s/ James Hopenfeld (with permission)
James Hopenfeld (CA Bar No. 190268)
jhopenfeld@singerbea.com
SINGER / BEA LLP
601 Montgomery Street, Suite 1950
San Francisco, CA 94111
Tel: (415) 500-6080
Fax: (415) 500-6080

*ATTORNEYS FOR DEFENDANT MEDIA
SCIENCE, INC.*

By: /s/ Gerard A. Haddad (with permission)
Gerard A. Haddad
New York Bar No. 2731271
GHaddad@BlankRome.com
BLANK ROME LLP
405 Lexington Avenue

New York, NY 10174-0208
Telephone: (212) 885-5135
Telephone: (917) 591-6921

Jeffrey K. Sherwood
Texas Bar No. 24009354
JSherwood@BlankRome.com
BLANK ROME LLP
1825 Eye Street, NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201

Melissa R. Smith
Texas Bar No. 24001351
Melissa@gillamsmithlaw.com
GILLAM & SMITH, LLP
303 South Washington Avenue
Marshall, Texas 75670
Telephone: (903) 934-8450
Facsimile: (903) 934-9257

*ATTORNEYS FOR DEFENDANTS
TOSHIBA CORPORATION and TOSHIBA
AMERICA INFORMATION SYSTEMS,
INC.*

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed electronically and served on all counsel of record through the Judicial Panel of Multidistrict Litigation's CM/ECF system on August 2, 2017.

In addition, the following party who is not currently represented by counsel was served via U.S. mail at the party's last known address listed below:

MarkAny,Inc.
10F, Ssanglim Bldg., 286 Toegye-ro, 151-11 Ssanglim Dong
Jung-gu, Seoul, South Korea

Dated: August 2, 2017

/s/ Andrew M. Holmes